

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Definition of "Agency" in the Administrative Procedure Act

Present Situation

Section 120.52(1), F.S., describes the various government entities that constitute "agencies" for the purposes of chapter 120, F.S., the Administrative Procedure Act (Act). The list includes the Governor in the exercise of executive powers other than those derived from the State Constitution; each state officer and state department; each authority, including a regional water supply authority; each board, including the Board of Governors and a state university board of trustees when acting pursuant to statutory authority derived from the Legislature; each commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature; each regional planning agency; each multicounty special district with a majority of its governing board comprised of nonelected persons; educational units; each entity described in chapters 163, 373, 380, and 582 and s. 186.504, F.S.; and each other unit of government, including counties and municipalities, to the extent they are expressly made subject to the Act by general or special law or existing judicial decisions. The definition also includes a number of specific exceptions from the Act.

Since the Administrative Procedure Act was enacted in 1974, the definition of "agency" has been amended numerous times, and it has become difficult to determine with certainty whether a particular entity is or is not an agency subject to the Act. The Florida courts generally apply a territorial or jurisdictional test in making this determination. If an entity operates in more than one county, it is subject to the Act. If an entity operates entirely within one county and has no authority outside that county, it is not subject to the provisions of the Act unless it has expressly been made subject to the Act by general or special law or existing judicial decisions.¹

Effect of Proposed Changes

The bill amends the definition of "agency" by clarifying that officers and governmental entities are "agencies" when acting under powers other than those derived from the constitution, by clarifying that a

¹ *Orlando-Orange County Expressway Authority v. Hubbard Construction Co.*, 682 So. 2d 566 (Fla. 5th DCA 1996); *Booker Creek Preservation, Inc. v. Pinellas Planning Council*, 433 So. 2d DCA 1306 (Fla. 2d DCA 1986). See also *In re: Lower Florida Keys Hospital District*, 1977 Op. Att'y Gen. Fla. 077-142.

municipality or legal entity created by a municipality is not considered an agency for purposes of the Administrative Procedures Act, by codifying existing case law, and by simplifying the current definition that has been amended numerous times since the enactment of the Administrative Procedure Act in 1974.

The amendments to s. 120.52(1), F.S., are not intended to effect a substantive change in the meaning of that subsection. The amendments are intended to clarify and simplify existing law and are intended to be consistent with judicial interpretations of that statute.

Notice of Meetings

Present Situation

Section 120.525, F.S., requires each agency to give notice of public meetings, hearings, and workshops by publication in the Florida Administrative Weekly not less than 7 days before the event. The statute also requires the agency to ensure that a copy of the agenda be received at least 7 days before the event by any person who requests a copy and pays the reasonable cost of the copy.

Effect of Proposed Changes

The bill requires an agency to give notice of meetings, hearings, and workshops on the agency's website in addition to publication in the Florida Administrative Weekly, and to publish the agenda, along with any meeting materials available in electronic form that exclude confidential or exempt information, on the agency's website. This will enhance public access to information and is consistent with other provisions of the Act that require electronic publication of materials.

Rule Adoption Procedures

In provisions of the Act relating to rule adoption procedures, the Joint Administrative Procedures Committee identified for needed revision areas related to the definition of small business, clarification of law to ensure availability of persons with responsibility for rule preparation at a public hearing, clarification of provisions related to material submitted to the agency, citing of the effective date of a rule, and the need for the inclusion of certain agency information on the agency website.

Present Situation

The Act requires agencies to consider the impact of a rule on small businesses as defined by s. 288.703, F.S., of the Florida Small and Minority Business Assistance Act.² Prior to 2000, s. 288.703(1), F.S., defined a "small business" in part as a business that employs 100 or fewer employees. In 2000, however, this portion of the definition was amended to refer to 200 or fewer employees. Currently, the Act still provides that an agency may define "small business" to include businesses employing more than 100 persons.

In the provision of the Act describing rule development procedures, an agency is required to ensure that persons responsible for preparing the proposed rule are available to explain the rule and respond to questions. That provision also requires that such a person not only be at a workshop but also at a public hearing.³ The same language regarding persons responsible for preparing the proposed rule to be at hearings is not mentioned in the specific provisions of the Act for hearings under rule adoption procedures, although the requirement exists in another provision of law.⁴

Any change to a proposed rule, other than a technical change, must be supported by the record of public hearings held on the rule, must be in response to written material received on or before the date

² Section 120.54(3)(b)2.a., F.S.

³ Section 120.54(2)(c), F.S.

⁴ Section 120.54(3)(c), F.S.

of the final public hearing, or must be in response to a proposed objection by the Joint Administrative Procedures Committee.⁵

The Act provides that, in certain circumstances, the effective date of a rule shall be specified or designated *in the rule*, meaning in the text of the rule itself.⁶ It would be confusing to have the effective dates of various portions of a rule printed in the text, however, and so the Department of State now removes these effective date provisions from the rule text and places them in the history note.

Section 120.54(5)(b)7., F.S., requires the uniform rules of procedure to include provision of a method by which each agency head must provide a description of the agency's organization and general course of its operations. Uniform Rule 28-101.001, F.A.C., states the agency head shall maintain a current statement of agency organization and operation and provide a copy to any person upon request.

Effect of Proposed Changes

The bill does the following:

- Makes the definition of small business in the Act consistent with the definition in s. 288.703, F.S.
- Requires that when a public hearing is held on a rule, the agency must ensure that staff are available to explain the agency's proposal and to questions or comments regarding the rule. Adding the language to the Act in the section dealing with rulemaking hearings will provide better public notice of this existing requirement.
- Clarifies that material submitted to the agency within 21 days after publication of the notice of proposed rulemaking or on or before the date of the final public hearing on the rule shall be considered by the agency and made a part of the rulemaking proceeding and shall serve as a basis for a notice of change.
- Requires that the effective date be specified in the notice of rulemaking, which will provide more efficient notice to the public and simplify procedures.
- Requires the statement of agency organization and operation be published on the agency's website, which will make the agency statement more accessible to the public and is consistent with other provisions of the Act that require electronic publication of information.

Exceptions and Special Requirements

Present Situation

An exception from certain rulemaking requirements for the Department of Environmental Protection in implementing s. 403.08725, F.S., is provided in s. 120.80(16), F.S. Under that provision, the Department of Environmental Protection was responsible for undertaking rulemaking to establish best available control technology, lowest achievable emissions rate, or case-by-case maximum available control technology for citrus juice processing facilities under s. 403.08725, F.S. The exception excluded the Department of Environmental Protection from the requirement to adopt the lowest regulatory cost alternative if the implementation of federal requirements would be impaired. Chapter 2008-150, L.O.F., repealed s. 403.08725, F.S. The Division of Statutory Revision and the Department of Environmental Protection recommended that s. 120.80(16), F.S., be deleted.

Effect of Proposed Change

The bill deletes the repealed provision.

⁵ Section 120.54(3)(d)1., F.S.

⁶ Section 120.54(3)(e)6. and (6)(b), F.S.

Authorizing Agency to Grant Variance

Provides that notwithstanding any other provision of law or rule that requires a project which is the subject of a license to commence within a specific time period, an agency may allow the delay of the commencement where the person demonstrates that the delay is the result of the economic conditions existing as of January 1, 2009, and where the license was issued, free and clear of all administrative and judicial proceedings, no later than July 1, 2009. The petition for waiver or variance under this provision must be submitted to the agency before June 31, 2010.

B. SECTION DIRECTORY:

Section 1. Amends s. 120.52, F.S., revising the definition of "agency" to codify existing case law, to clarify who is covered under the definition, and to simplify the current definition.

Section 2. Amends s. 120.525, F.S., requiring that an agency give notice of meetings, hearings, and workshops on the agency's website and that the agency also publish on the website the agenda, along with any available meeting materials that are in an electronic format that exclude confidential or exempt information.

Section 3. Amends s. 120.54, F.S., revising the definition of "small business" to conform to the current definition in s. 288.703, F.S.; clarifying that an agency ensure that staff be available at a public hearing on a proposed rule; requiring that certain materials submitted to the agency on or before the date of the final date of the public hearing be considered and made part of the rulemaking proceeding hearing; requiring a change to a proposed rule be in response to written materials submitted to the agency within specified times; requiring the statement of an agency's organization and operations be published on the agency's website; and requiring the effective date of the proposed rule be specified in the agency notice of intent to adopt a rule.

Section 4. Amends s. 120.80, F.S., deleting an exception from certain rulemaking requirements for implementing s. 403.08725, F.S., pertaining to citrus juice processing facilities.

Section 5. Provides intent of changes to s. 120.52(1), F.S., relating to the definition of "agency."

Section 6. Authorizes an agency to grant a petition for a variance or a waiver to a rule that requires the commencement of a project that is the subject of a license within a specific time period; provides conditions for the grant of petition for a variance of a waiver; provides for a timeframe.

Section 7. Provides an effective date of July 1, 2009.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill requires additional information to be provided on agency websites. It is not known what, if any, additional expense or cost savings an agency might experience for such publications or if an agency can absorb any additional costs.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require a county or municipality to spend funds or take an action requiring expenditures; reduce the authority that counties and municipalities had as of February 1, 1989, to raise revenues in the aggregate; or reduce the percentage of a state tax shared in the aggregate with counties and municipalities as of February 1, 1989.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not grant new rulemaking authority to an agency; however, it does revise requirements related to rulemaking that impact all agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On April 14, 2009, the Economic Development & Community Affairs Policy Council adopted four amendments and passed the bill as a council substitute. The amendments do the following:

- Clarify that officers and governmental entities are "agencies" when acting under powers other than those derived from the constitution.
- Clarify that a municipality or legal entity created by a municipality is not considered an agency for purposes of the Administrative Procedures Act.
- Clarify that meeting materials published on an agency's website does not contain any confidential and exempt information.
- Require that agency staff, not necessarily the persons responsible for preparing a proposed rule, are available at a public hearing on a rule to explain the proposal and answer questions.
- Clarify when materials submitted to an agency must be considered and made part of the rulemaking proceeding record.

- Provide that the amendments to the definition of "agency" are not intended to effect a substantive change in meaning of s. 120.52(1), F.S.
- Authorize an agency to grant a petition for a variance or a waiver to a rule that requires the commencement of a project that is the subject of a license within a specific time period; provides conditions for the grant of petition for a variance of a waiver; and provides for a timeframe.